Supreme Court, U.S.
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No. 96-252

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DCX, INC.,
Petitioner,

v.

WILLIAM J. PERRY,
SECRETARY OF DEFENSE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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October 25, 1996

PARTIES TO THE PROCEEDING

The parties to the proceeding remain the same as described in the Petition. The petitioner, named in the caption, was plaintiff and appellant below. DCX, Inc. is a publicly traded corporation. DCX, Inc. owns one closely held subsidiary, GeoStar International, Inc, doing business as GeoNova International, Inc.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDINGS i

TABLE OF AUTHORITIES iii

THE JUXTAPOSITION OF THE GOVERNMENT'S BRIEF IN OPPOSITION AND THE BRIEF OF *AMICI* IN SUPPORT OF PETITIONER PRESENTS A CONSTITUTIONAL QUESTION 1

THE FAR PROVIDES A PRE-DEPRIVATION HEARING FOR DEFAULT TERMINATIONS IN ORDER TO COMPLY WITH THE REQUIREMENTS OF DUE PROCESS 3

PETITIONER'S CONSTRUCTION OF THE FAR AS SUBJECT TO THE APA AVOIDS THE UNNECESSARY DUE PROCESS ISSUES RAISED BY THE FEDERAL CIRCUIT'S HOLDING 6

UNDER THE FEDERAL CIRCUIT'S OPINION, EVERY GOVERNMENT CONTRACTOR MAY BE SUBJECTED TO A DEFAULT TERMINATION WHICH VIOLATES DUE PROCESS 8

TABLE OF AUTHORITIES

Page

CASES

Brock v. *Roadway Express*,
481 U.S. 252 (1987) 4

Cleveland Bd. of Educ. v. *Loudermill*,
470 U.S. 532 (1985) 4, 9

Darwin Const. Co. v. *United States*,
811 F.2d 593 (Fed. Cir. 1987) 8

DeVito v. *United States*,
188 Ct. Cl. 979, 413 F.3d 1147 (1969) 8

Fuentes v. *Shevin*,
407 U.S. 67 (1972) 9

Goldberg v. *Kelly*,
397 U.S. 254 (1970) 4, 8, 9

J.D. Hedin Constr. Co. v. *United States*,
187 Ct. Cl. 571, 408 F.2d 424 (1969) 8

Joint Anti-Fascist Refugee Committee v. *McGrath*,
341 U.S. 123 (1951) 9

Machinists v. *Street*,
367 U.S. 740 (1961) 7

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 4, 8, 9

Morrissey v. *Brewer*,
408 U.S. 471 (1972) 3

TABLE OF AUTHORITIES -- Continued

Page

CASES - Continued

Murray v. *The Charming Betsy*,
2 U.S. (2 Dallas) 64 (1804) 7

National Labor Relations Board v.
Catholic Bishop of Chicago,
440 U.S. 490 (1979) 7

Perry v. *Sindermann*,
408 U.S. 593 (1972) 8

Schlesinger v. *United States*,
182 Ct. Cl. 571, 390 F.2d 702 (1968) 8

Sniadach v. *Family Finance Corp.*,
395 U.S. 337 (1969) 8, 9

United States v. *James Daniel Good Real Property*,
510 U.S. 43 (1993) 8

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. CONST. AMEND V . . . . . *passim*

Administrative Procedure Act ["APA"],
5 USC §706(2)(d) . . . . . *passim*

Contract Disputes Act,
41 USC §601 *et seq.* 6 n.4

Federal Acquisition Regulations ["FAR"],
48 CFR §49.402-3 . . . . . *passim*

TABLE OF AUTHORITIES -- Continued

Page

LEGISLATIVE HISTORY

Office of Federal Procurement Policy Act,
88 STAT. 796, P.L. 93-400, 93D CONG., 2D SESS.
3 1974 U.S.C.C.A.N. 4589 . . . . . 3 n.1

93 STAT. 648, P.L. 96-83, 96TH CONG., 1ST SESS.
2 1979 U.S.C.C.A.N. 1492 . . . . . 3 n.1

97 STAT. 1325, P.L. 98-191 (1983) 3 n.1

Final Rule Establishing the Federal Acquisition Regulation,
48 FR 42102 (September 19, 1983) 3 n.1

TREATISES

JOHN CIBINIC, JR. AND RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS (3d ed. 1994) 4 n.2

KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (3d ed. 1994). 2

SUTHERLAND ON STATUTORY CONSTRUCTION (Norman J. Singer, ed., 5th ed. 1992) 7

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) 3, 4

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REPLY BRIEF FOR THE PETITIONER

THE JUXTAPOSITION OF THE GOVERNMENT'S BRIEF IN OPPOSITION AND THE BRIEF OF *AMICI* IN SUPPORT OF PETITIONER PRESENTS A CONSTITUTIONAL QUESTION

The Government's Brief in Opposition begs the most fundamental of questions: How could the Federal Circuit ever find the conduct of a contracting officer to be arbitrary and capricious if, as a matter of law, a contracting officer has no duty to make any inquiry into the excusability of the contractor's delay, or to consider any of the other factors enumerated in the Federal Acquisition Regulations ["FAR"]

§49.402-3(f)? *See, e.g., DCX* v. *Perry*, 79 F.3d 132, 135 (Pet. App. 8a-9a). Indeed, a pre-deprivation hearing in which the contracting officer is required to make reasoned inquiry into the excusability of the contractor's delay, as well as the other factors enumerated in FAR §49.402-3(f), is a necessary predicate to judicial review of a default termination.

The Brief of *Amici Curiae,* the Contract Electronics Association, the Colorado Association of Commerce and Industry, Ophir Corporation, and Defenders of Property Rights, addresses this issue by focusing and expanding upon the related due process concerns noted in the Petition. Pet. at 22 *citing* KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., II ADMINISTRATIVE LAW TREATISE §9.1 at 2 (3d ed. 1994). The *Amici* articulate these concerns as the question, "Whether the Due Process Clause of the Fifth Amendment requires a government agency to provide notice and a pre-deprivation hearing before terminating a procurement contract for default?".

The Government's Brief in Opposition seeks to dismiss this entire question, addressed in the Petition as an issue arising under the Administrative Procedure Act ["APA"], Pet. at 10-18, by characterizing it as a mere "alternative holding" "not squarely presented" to this Court. *See* Br. Opp. at 4-5. The Federal Circuit's failure to bind the Government to the default termination criteria published at FAR §49.402-3(f), however, creates an illusory standard of review under which virtually every default termination may be made out to be supported by substantial evidence, thereby rendering judicial review ineffective.

This Reply addresses the issues which arise from the juxtaposition of the Government's Brief in Opposition and the Brief of *Amici* in Support of Petitioner.

THE FAR PROVIDES A PRE-DEPRIVATION HEARING FOR DEFAULT TERMINATIONS IN ORDER TO COMPLY WITH THE REQUIREMENTS OF DUE PROCESS

As a preliminary matter, when considering whether Constitutional due process has been abrogated, it is necessary to identify the nature of the interest involved, and then to decide what form of process most appropriately protects that interest. *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW at §§10-12,-13,-14 (2d ed. 1988). A precise resolution of these questions with regard to this case is beyond the scope of this document. However, the framers of the FAR -- The FAR Council[1] -- appeared to recognize that the default termination process implicates a contractor's property interest, and provided for a pre-deprivation hearing prior to the termination of a procurement contract for default. *See* FAR §49.402-3(e)(1) ("If termination for default appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of the termination ... and request the contractor to show cause why the contract should not be

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[1] The FAR Council was established under the auspices of the Office of Federal Procurement Policy while implementing Congressional directives to centralize policy and leadership in the area of federal government procurement. *See generally* legislative history of the Office of Federal Procurement Policy Acts, 88 Stat. 796, P.L. 93-400, 93D CONG., 2D SESS., 3 1974 U.S.C.C.A.N. 4589, *and* 93 Stat. 648, P.L. 96-83, 96TH CONG., 1ST SESS., 2 1979 U.S.C.C.A.N. 1492; 97 Stat. 1325, P.L. 98-191 (1983); Final Rule Establishing the Federal Acquisition Regulation, 48 CFR Ch. 1, 48 FR 42102 (September 19, 1983).

terminated for default."). Thus, the FAR affords contractors a pre-deprivation hearing -- notice and opportunity to show cause why the contract should not be terminated for default. *See* TRIBE at §10-14 n.30 *citing Mathews* v. *Eldridge*, 424 U.S. 319 (1976) ("upholding Social Security Administration's provision for notice and an opportunity to present rebutting evidence, but no evidentiary hearing, prior to the termination of federal disability benefits").

Assuming *arguendo* that this is the appropriate level of process for the termination of government contracts, on its face, the language of the FAR passes muster under the Fifth Amendment and the APA. The factors listed in FAR §49.402-3(f) are substantially comprehensive, and when considered together, are fair and pragmatic indicators of a contractor's ability to meet its obligations to the Government. The procedure defined in the FAR, and particularly consideration of the FAR §49.402-3(f) factors required by the plain language of the regulation, serves as an "initial check against mistaken deprivations." *Brock* v. *Roadway Express*, 481 U.S. 252, 261-62 (1987). *See also Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545-46, 552 (1985); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

The Federal Circuit's interpretation, however, creates problems on several levels. First, the opinion departs from the plain language of the regulation and instead holds that government contractors are not entitled to the notice and pre-deprivation hearing provided by FAR §49.402-3(e)(1). *See* 79 F.3d at 135 (Pet. 8a-9a). Additionally, as the FAR "does not confer rights on a defaulting contractor," *id.*,[2] should the

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[2]*Cf.* JOHN CIBINIC, JR. AND RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS at 25-26 (3d ed. 1994) (discussing cases in which procurement regulations

contracting officer fail to consider one or more of the FAR §49.402-3(f) factors in his pre-deprivation hearing, then his conduct may be held to be neither arbitrary nor capricious, regardless of whether the failure to consider the factor was prejudicial to the contractor. *See id.* Finally, nothing in the FAR suggests that once the Government has accorded a contractor due process on one occasion, it has discharged its duty to comply with the Constitution or the APA on subsequent occasions.

Contrary to the Government's representation, *see* Br. Opp. at 5, the Board of Contract Appeals cases cited by the Federal Circuit only concern controversies in which the failure to consider one of the FAR §49.402-3(f) factors did not create prejudice for the contractor. *DCX* v. *Perry* presents a different case: the termination contracting officer's failure to consider any explanation for the continued delay resulted in severe prejudice which DCX has been attempting to rectify through post-deprivation procedures for more than eight years.[3]

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having the "force and effect of law" pursuant to the *Christian* doctrine, as does the FAR, have been applied to benefit contractors).

[3]Although the Federal Circuit emphasizes that the contracting officer had not received an explanation for DCX's delay, 79 F.3d at 135 (Pet. at 9a), the record before the Board reflects that DCX had faxed an explanatory memorandum to its contact at the Defense General Supply Center, the termination contracting officer's supervisor, and that the memorandum was on that supervisor's desk at the time the notice of termination issued. The memorandum explained that the Defense Priorities and Allocations ["DPAS"]-caused delay, for which the government had already granted DCX a

The Federal Circuit, by inappropriately expanding the Boards of Contract Appeals' pragmatic *de minimis* rule, has effectively eliminated the specific and exclusive vehicle for ensuring due process to government contractors in the default termination process.[4] The prejudice which results from a termination contracting officer's failure to consider relevant information as directed by the FAR gives rise not only to a violation of the APA, as discussed in the Petition, but also to a violation of Constitutional due process.

PETITIONER'S CONSTRUCTION OF THE FAR AS SUBJECT TO THE APA AVOIDS THE UNNECESSARY DUE PROCESS ISSUES RAISED BY THE FEDERAL CIRCUIT'S HOLDING

Denial of Constitutional due process to DCX and due process under the APA lies not in any structural or linguistic defect of the FAR, but in the Federal Circuit's holding that

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forbearance, had lasted longer than originally anticipated, that the DPAS-caused delay had been resolved, and that testing would be completed within 72 hours. This information was available to the termination contracting officer and he would have discovered it had he conducted a pre-deprivation hearing as contemplated by FAR §49.402-3(e)(1). The contracting officer testified that he made no inquiry because believed he had no duty to do so; the Federal Circuit has affirmed that view. *See* 79 F.3d at 135 (Pet. at 9a).

[4]The government of the United States is immune from common law actions for breach of contract. The sole and exclusive remedy for contractors lies under the Contract Disputes Act, 41 USC §601 *et seq.* and its implementing regulations, including the FAR.

contractors are neither entitled to the protection of the pre-deprivation hearing provided by FAR §49.402-3(e)(1) nor the substantive considerations enumerated in FAR §49.402-3(f). Although the Federal Circuit may give deference to the contracting officer's view that he has no legal duty to conduct either a pre-deprivation hearing or to evaluate the criteria enumerated in FAR §49.402-3 while effecting such a hearing, deference cannot preserve an interpretation which yields unconstitutional results.

Regulations are governed by the same rules of construction which apply to statutes. *See* 1A SUTHERLAND ON STATUTORY CONSTRUCTION at §31.06 (Norman J. Singer, ed., 5th ed. 1992). One of the preeminent canons of statutory construction requires that a statute or regulation be construed so as to avoid Constitutional questions. *See National Labor Relations Board* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979) (citing *Murray* v. *The Charming Betsy,* 2 U.S. (2 Dallas) 64, 118 (1804); *Machinists* v. *Street,* 367 U.S. 740 (1961). The plain language of FAR §49.402-3, particularly the use of the phrase "shall consider" demonstrates that the FAR must be construed as requiring the consideration of all the factors enumerated in FAR §49.402-3(f) prior to terminating a contract for default. *See, e.g.,* 3 SUTHERLAND ON STATUTORY CONSTRUCTION at §§57.01-.03. Any default termination in which all of these factors have not been considered, where such failure is material, should be set aside as invalid agency action pursuant to the APA. *See* 5 USC §706(2)(D). Petitioner's interpretation of the FAR is consistent with both the plain language of the regulation and the APA, while avoiding the Constitutional due process question; this is the approach which should govern all federal government contracting.

UNDER THE FEDERAL CIRCUIT'S OPINION, EVERY GOVERNMENT CONTRACTOR MAY BE SUBJECTED TO A DEFAULT TERMINATION WHICH VIOLATES DUE PROCESS

The power and scope of the Federal Circuit's opinion is extraordinary. It exposes every government contractor to the possibility of a termination for default without: (1) the benefit of the pre-deprivation hearing contemplated by the framers of the FAR in 48 CFR §49.402-3(e)(1), and this Court in *Mathews* as well as numerous other decisions, *see, e.g., Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); (2) consideration of the factors enumerated in the FAR at 48 CFR §49.402-3(f); and (3) under circumstances which may well render subsequent judicial review meaningless.

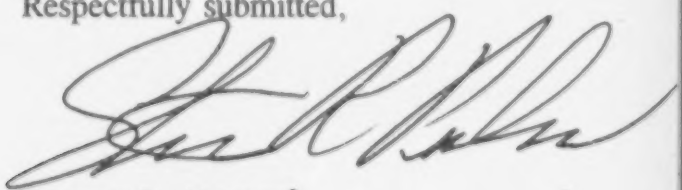
Government contractors invest considerable property resources in the performance of their contracting activities. Terminations for default impose extreme hardships upon government contractors, particularly small business contractors such as DCX. It is for this reason that the Courts have historically viewed terminations for default as drastic and draconian in nature. *See, e.g., Darwin Constr. Co.* v. *United States,* 811 F.2d 593 (Fed. Cir. 1987); *DeVito* v. *United States*, 188 Ct. Cl. 979, 413 F.2d 1147 (1969); *J.D. Hedin Constr. Co.* v. *United States,* 187 Ct. Cl. 571, 408 F.2d 424 (1969); *Schlesinger* v. *United States,* 182 Ct. Cl. 571, 390 F.2d 702 (1968).

The Federal Circuit's Opinion in *DCX* v. *Perry* marks not only a significant departure from the spirit of these cases; the effect of the holding on government contractors also offends the sense of fair play to the individual this Court has historically sought in due process cases. *See, e.g., United*

States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993); *Loudermill*, 470 U.S. 532; *Mathews*, 424 U.S. 319; Fuentes v. *Shevin*, 407 U.S. 67 (1972); *Goldberg*, 397 U.S. 254; *Sniadach, 395 U.S. 337; Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951). *DCX* v. *Perry* is the Federal Circuit's first published opinion concerning a contractor's procedural rights under the FAR's default termination provisions and is already considered of such significance that it has been included in the Federal Contracts Reporter. *See* 40 FCC ¶76,901.

For the foregoing reasons, this Court should issue a Writ of Certiorari and reverse the decision of the Court of Appeals for the Federal Circuit.

Respectfully submitted,



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